

No. 13025

United States
Court of Appeals
for the Ninth Circuit.

E. R. CRAIN and FINTON J. PHELAN, JR., on
Behalf of Themselves and Other Persons
Similarly Situated,

Appellants,

vs.

The Government of Guam,

Appellee.

Transcript of Record

Appeal from the District Court of Guam,
Territory of Guam.

FILED

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Clerk's Certificate of Transfer	21
Complaint	3
Designation of Record for Appeal.....	25
Motion to Dismiss.....	7
Notice of.....	8
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	14
Opinion	9
Order	14
Statement of Points.....	23
Summons	7
Transcript of Proceedings (Excerpts of).....	15

NAMES AND ADDRESSES OF ATTORNEYS

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FINTON J. PHELAN, JR.;

Aflague Building,

Agana, Guam;

Attorneys for the Plaintiffs.

KNIGHT G. AULSBROOK,

Attorney General;

Administration Building,

Agana, Guam;

Attorney for the Defendant.

The District Court of Guam

Civil No. 10-51

E. R. CRAIN and FINTON J. PHELAN, JR.,
on Behalf of Themselves and Other Persons
Similarly Situated,

Plaintiffs,

vs.

THE GOVERNMENT OF GUAM,

Defendant.

COMPLAINT

1. The action arises under Public Law 630, 81st Congress, Chapter 512, 2nd Section (The Organic Act of Guam).

2. Plaintiffs are citizens of the United States and residents of the unincorporated territory of Guam and bring this action as a class action on behalf of themselves and all other persons resident on Guam, said persons being too numerous to join herein as parties plaintiff, deriving income from sources within the said unincorporated territory of Guam.

3. The unincorporated territory of Guam, by statute, has the status of a possession of the United States of America.

4. The government of Guam, created by the Organic Act of Guam, is a government of limited powers as defined by said Organic Act of Guam.

5. The Internal Revenue Code of the United

States, including within said Code the Income Tax Law of the United States, was in full force and effect within Guam prior to the enactment of the Organic Act of Guam, and the said Internal Revenue Code of the United States has not been suspended or repealed by the said Organic Act of Guam or by any other act of the Congress of the United States.

6. The Organic Act of Guam specifically reaffirms the application in Guam of the income tax sections of the Internal Revenue Code of the United States.

7. The government of Guam, through its officers, agents and servants, has asserted the right to collect an income tax, citing authority alleged to be granted to it by the Organic Act of Guam, which authority and right do not in fact exist.

8. The government of Guam, acting through its officers, agents and servants has procured the publication of numerous notices, statements and claims with respect to alleged income tax procedures and payments due to the government of Guam, and copies of such notices, statements and claims have been published in the daily press and have been served upon and delivered to plaintiffs and others.

9. The acts and actions of the officers, agents and servants of the government of Guam, as more particularly described in numbered paragraphs 7 and 8 herein, constitute a violation of the provisions of subsections (e) and (f) of Section 5 of the Organic Act of Guam.

10. The acts of the officers, agents and servants of the government of Guam, as set out in numbered paragraphs 7 and 8 herein, constitute an invasion of the legislative prerogatives of the Congress of the United States by enacting by executive interpretation an income tax law for the unincorporated territory of Guam, and an attempt to incorporate the same into the Organic Act of Guam.

11. The acts and actions of the officers, agents and servants of the government of Guam, as set out in numbered paragraphs 7 and 8 herein, is an attempt to superimpose by administrative determination the full weight and burdens of the United States Income Tax Statutes as a territorial tax upon the plaintiffs and others who are already subject to the provisions of said United States Income Tax Stautes.

12. As a result of the acts and actions set out in numbered paragraphs 7 and 8 herein, irreparable damage will be suffered by the plaintiffs in this action, and no adequate remedy exists at law by which plaintiffs may seek relief.

Wherefore, plaintiffs demand that the Court adjudge:

(1) That the Internal Revenue Code of the United States applies to Guam as written.

(2) That the unincorporated territory of Guam is, with respect to the United States, a possession.

(3) That the government created by the Organic

Act of Guam is a government of limited and express powers.

(4) That the Income Tax Laws of the United States are not repealed or suspended by the provisions of the Organic Act of Guam.

(5) That the Organic Act of Guam does not create a territorial income tax.

(6) That the government of Guam, its officers, agents and servants be restricted from attempting to collect such alleged territorial income tax.

(7) That the Court grant such other and further declaratory relief as within its discretion may be deemed appropriate by it.

(8) That plaintiffs recover their costs.

CRAIN & PHELAN,

By /s/ FINTON J. PHELAN, JR.,

Attorneys for Plaintiffs.

[Endorsed]: Filed April 17, 1951.

[Title of District Court and Cause.]

SUMMONS IN A CIVIL ACTION

To the above-named Defendant:

You are hereby summoned and required to serve upon Crain and Phelan, plaintiff's attorney, whose address, Suite 101, Aflague Building, Agana, Guam; an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal] /s/ ROLAND A. GILLETTE,
Clerk of Court.

Date April 17, 1951.

Return on Service of Writ attached.

[Endorsed]: Filed April 20, 1951.

[Title of District Court and Cause.]

MOTION TO DISMISS

Defendant entering a special appearance for the purpose of this motion and for no other purpose moves the court to dismiss the complaint and the action herein on the following grounds:

1. This is an improper class action.
2. Plaintiffs failed to join an indispensable party.
3. The court lacks jurisdiction over the defendant.
4. The court lacks jurisdiction over the subject matter.

5. The complaint fails to state a claim upon which relief can be granted.

This motion is based upon all the records and files herein, and upon the written statement of reasons in support of the motion and a list of citations of the authorities on which defendant relies, which said statement and list are attached hereto and by this reference made a part hereof.

/s/ KNIGHT G. AULSBROOK,
Attorney General,
Attorney for Defendant.

Copy received.

[Title of District Court and Cause.]

NOTICE OF MOTION

To E. R. Crain and Finton J. Phelan, Jr. and other persons similarly situated, and their attorneys Crain & Phelan:

Please take notice, that the undersigned will bring the foregoing motion on for hearing before this court in its courtroom in the Guam Congress Building, Agana, Guam at 9:00 o'clock a.m. on Tuesday, the 15th day of May, 1951, or as soon thereafter as counsel can be heard.

/s/ KNIGHT G. AULSBROOK,
Attorney General, Government of Guam, Attorney
for Defendant.

[Endorsed]: Filed May 9, 1951.

The District Court of Guam for the
Unincorporated Territory of Guam

Civil No. 10-51

E. R. CRAIN and FINTON J. PHELAN, JR.,
on Behalf of Themselves and Other Persons
Similarly Situated,

Plaintiffs,

vs.

THE GOVERNMENT OF GUAM,

Defendant.

Appearances:

E. R. CRAIN, ESQ.,

FINTON J. PHELAN, JR., ESQ.,

Pro Se.

KNIGHT G. AULSBROOK, ESQ.,

Attorney General for Guam.

OPINION

Shriver, Judge

The question involved in this action is the construction to be placed on Sec. 31 of the Organic Act of Guam, 64 Stat. 392, 48 USCA 1421i which provides:

The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.

Sec. 30 of the Organic Act provides that Federal

income taxes derived from Guam and certain other taxes

shall be covered into the treasury of Guam and shall be expended for the benefit and government of Guam in accordance with the annual budgets.

Sec. 31 was introduced in the House of Representatives by Congressman Miller of Nebraska as an amendment to the organic Act then under consideration and adopted. Cong. Rec., May 23, 1950, Vol. 96, pp. 7673 and 7674. In response to a question Congressman Miller stated after the adoption of the amendment:

There will be no direct payment by the Treasury of this country. The amendment we have just adopted in committee provides that the income-tax laws in force in the United States of America and which may hereafter be in force will be the law over there. That will be of great help in plugging certain loopholes. The people of Guam and a large number of civilians and workers over there on construction work, as well as military personnel, pay no income tax or have no withholding tax. In fact, they are paid a bonus for working there. This will plug that loophole and bring in some money to the United States Treasury.

The Treasury Department has construed Sec. 31 as establishing a territorial tax which sets up a separate income tax system for Guam, a duplicate of the Federal income tax system, 1951-6-13559, I.T.

4046. It would appear to be clear that the effect of Sec. 31 is to create a tax liability on Guam, insofar as the taxpayer is concerned, on the same basis as if he were resident in the continental United States and that the Government of Guam is entitled to such tax regardless of which government collects it.

The plaintiffs began this class action for a declaratory judgment holding that:

(1) The Internal Revenue Code of the United States applies to Guam as written.

(2) The unincorporated territory of Guam is, with respect to the United States, a possession.

(3) The Government created by the Organic Act of Guam is a government of limited and express powers.

(4) The Income Tax Laws of the United States are not repealed or suspended by the provisions of the Organic Act of Guam.

(5) The Organic Act of Guam does not create a territorial income tax.

(6) The Government of Guam, its officers, agents and servants be restricted from attempting to collect such alleged territorial income tax.

(7) The Court grant such other and further declaratory relief as within its discretion may be deemed appropriate by it.

The defendant moved to dismiss the complaint upon the grounds that:

(1) It is an improper class action.

(2) Plaintiffs failed to join as indispensable party.

(3) The court lacks jurisdiction over the defendant.

(4) The court lacks jurisdiction over the subject matter.

(5) The complaint fails to state a claim upon which relief can be granted.

In view of the dependence of the Government of Guam on the proceeds of the income tax to meet its budgetary requirements and the public importance of the question, the court has gone further in outlining its views as to the creation of a tax liability than would be required to dispose of the motion to dismiss.

Discussion

The Government of Guam was established by the Organic Act of Guam, Sec. 3 of such Act, 64 Stat. 384, USCA 1421a provides:

Guam is declared to be an unincorporated territory of the United States and the capitol and seat of government thereof shall be located at the city of Agana, Guam. The government of Guam shall have the powers set forth in this chapter and shall have power to sue by such name. The government of Guam shall consist of three branches, executive, legislative, and judicial, and its relations with the Federal Government shall be under the general administrative supervision of the head of such civilian

department or agency of the Government of the United States as the President may direct.

It has been held that territorial governments so created are immune from suit without their consent even when the Organic Act provided that they could be sued. *People of Porto Rico v. Ramos* 34 S. Ct. 461, 232 U.S. 627; *A. J. Trestani Sucrs Inc., v. Bussoglia* 166 F. 2d. 966.

The Government of Guam has not consented to this action against it and it is the court's opinion that it is immune from suit without its consent. It follows that the court has no jurisdiction over the defendant.

The purpose of the action is to obtain a declaratory judgment to the effect that the Government of Guam has no authority to impose or collect a tax under the provisions of Sec. 31, *supra*, but that this section must be construed in relationship to other applicable provisions of the United States Internal Revenue Code; that any tax imposed by Sec. 31 is the concern of the United States Government and not the Government of Guam. Even assuming that the Government of Guam had waived its immunity from suit, this court could not take jurisdiction. As was stated in *Noland v. Westover, et al.*, 9 Cir. 172 F. 2d. 615.

The only definite relief asked is for a declaratory judgment, but the statute authorizing the district court to render a declaratory judgment does not authorize its application in controversies in respect of tax problems. 28 USCA,

2201; *Red Star Yeast and Products Co., v. La Biddle*, 7 Cir., 83 F. 2d. 394; *Wilson v. Wilson*, 4 Cir., 141 F. 2d. 599.

ORDER

The court does not consider it necessary to discuss other grounds raised by the motion to dismiss. For the foregoing reasons the complaint is dismissed without leave to amend.

Dated at Agana, Guam, this sixteenth day of May, A. D. 1951.

/s/ PAUL D. SHRIVER,
Judge, District Court of
Guam.

[Endorsed]: Filed May 16, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS NINTH CIRCUIT

Notice is hereby given that E. R. Crain and Finton J. Phelan, Jr., appellants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order entered in this action on the sixteenth day of May, A. D. 1951.

CRAIN & PHELAN,

By /s/ E. R. CRAIN,
Attorneys for Appellants.

[Endorsed]: Filed June 13, 1951.

District Court of Guam

Civil No. 10-51

Before: The Honorable Paul D. Shriver, Judge.

E. R. CRAIN and FINTON J. PHELAN, JR.,
on Behalf of Themselves and Other Persons
Similarly Situated,

Plaintiffs,

vs.

THE GOVERNMENT OF GUAM,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Excerpts of
May 15, 1951

Appearances:

For the Plaintiffs:

PRO SE.

For the Defendant:

RUSSELL STEVENS,

Assistant Attorney General,

Government of Guam.

(On Defendants' Motion to Dismiss.)

* * *

Mr. Stevens: Number three; the court lacks jurisdiction over the defendant. This point was decided by your Honor in the case of Joaquina Castro Aguan, et al., vs. the Government of Guam, civil

case 5-51, which was decided here on April 5, 1951.

Number four; the matter of the jurisdiction of this court over the subject matter. There are two points under that:

The first one is that the jurisdictional amount which is a mandatory provision is not provided for in the complaint. There is no way of ascertaining in the complaint what is involved in the way of money; that is a point which must be clarified. Section 1331, covered in 28 U.S.C.A., provides for the jurisdictional amount as does Rule 8(a) which does not provide a specific amount as does Section 1331.

* * *

and, as I mentioned above, I don't think this court has jurisdiction because of 2201, 28 U.S.C.A. To take jurisdiction—I think it is just out of the jurisdiction, I think——

The Court (Interrupting): In other words, they have to take one position or the other?

Mr. Stevens: Yes, sir.

The Court: If they take the position that you have no authority and that all the authority rests in the United States Government, then they are out by virtue of the rule which does not give this court authority in matters involving federal taxes.

Mr. Stevens: Yes, sir, that is our contention exactly.

* * *

Mr. Phelan: The Collector of Internal Revenue of the United States has ruled the territorial tax to be administered by the Government of Guam. Now,

the Government of Guam comes in here and says that it is a federal tax; I think the Government of Guam should adequately determine what it is.

The Court: I didn't understand Mr. Stevens to say that it is a federal tax in that sense; I think what he meant was that if it isn't a territorial tax to be collected by the United States Government, the court has no jurisdiction.

Mr. Phelan: There is no attempt made by this case to stop the collection of a United States tax owed to the United States. We are seeking in this action for a declaratory judgment under Public Law 630, the Organic Act of Guam. It is my contention that in asking a declaratory judgment, as to what the statute means, we do not need to state any jurisdictional amount, no amount is necessary.

The Court: Don't your statutes require that, in a case where you are asked to construe a federal law, unless it is a type of thing which cannot be measured in money, such as the Discrimination Civil Rights Statute and that sort of thing, that there must be the jurisdictional amount stated?

Mr. Phelan: As I read the rule, I saw no requirement in the rule stating there must be a jurisdictional amount but it could have been easily supplied.

The Court: Yes, I merely raised that question because, of course, a new question arises under the jurisdictional amount rule.

* * *

The Court: If it is a United States tax, what jurisdiction do I have?

Mr. Phelan: We would like that thing decided: if it is a United States tax and what jurisdiction has the Government of Guam?

The Court: Well, assuming you have a valid dispute on that point; this is a court of limited jurisdiction and the laws say I do not have any jurisdiction involving federal taxes.

Mr. Phelan: Is it or is it not a federal tax? The Court has the right to determine whether it is or is not.

The Court: Well, ordinarily, if the Court does that, it should have before it all parties who want to contend that it isn't a federal tax, including the United States which contends that it is not a federal tax but a territorial tax which is imposed under federal legislation.

* * *

The Court: We have got one fundamental point: what jurisdiction does this court have over the Government of Guam?

Mr. Phelan: If the Government of Guam is a sovereignty, that is, in this type of case, that would be a question. Now there is no question that, over any subordinate agency or even of the United States in certain actions, United States Courts have jurisdiction, it is limited by the Constitution.

The Court: The only jurisdiction exercised over the Government is exercised by the Supreme Court when government sues government.

Mr. Phelan: Yes, but there are certain matters involving a state which may go into a Federal Court.

The state may go into a Federal Court, true; now the court lacks jurisdiction over the defendant. Suppose the territorial government of Guam is a government sovereignty; there is nothing in the Organic Act that creates a sovereignty here.

* * *

Mr. Phelan: But that gives local home rule; does this government enjoy the dignity of the Government of Hawaii, Alaska or one of the 48 States; does it put it beyond the reach of the United States Court?

The Court: It places the government as a sovereignty beyond the jurisdiction of the United States Court, unless the Congress of the United States specifically gave it jurisdiction or unless the Government of Guam, by its own act, submitted itself to jurisdiction. It is the old theory that the king can do no wrong; the government can submit itself to suit and if it does so, it of course is liable like any other litigant, but if it chooses not to do so and if it is an independent sovereignty, then the courts have no jurisdiction over the actions of the government.

Mr. Phelan: That is true.

The Court: Now the court may have jurisdiction over the actions of individuals——

Mr. Phelan (Interrupting): I realize that.

The Court: ——proposing to do something which is beyond their power or their authority, but the government—this intangible thing that we call government and the sovereign is in a different position.

Mr. Phelan: If it please the Court, I still contend—I believe I can find cases to support it, that relationship of the Government of Guam to the United States and to the United States Congress is similar to that of a county to the legislature of a state back home; that is, it enjoys a peculiar existence, it is definitely a governmental agency but is it entitled to the dignity of a sovereignty?

* * *

The Court: Now, what about the question of the applicability of the federal rule? Assuming that the Government of Guam is subject to suit; you ask the Court to determine that it has no authority to enforce Section 31; that such authority as exists is solely in the hands of the Government of the United States. Now you don't question that this is a tax, do you?

Mr. Phelan: I do question the fact that there is a territorial tax, I am not questioning the fact that there is a United States income tax.

The Court: Yes, exactly. Now how did we get away from the question that this court does not have action where federal taxes are involved?

Mr. Phelan: Because we are not questioning the federal tax, we are questioning the territorial tax which is being read into the Organic Act.

The Court: But you affirmatively asked the Federal Court to hold the United States Government as the only legal entity entitled to enforce that provision.

* * *

District Court of Guam
for the Territory of Guam—ss.

I, John E. Barnes, Official Court Reporter for the District Court of Guam, hereby certify that the above and foregoing transcript is composed of true and correct excerpts from the proceedings had in the above-entitled matter in said Court at the time and place as set forth.

/s/ JOHN E. BARNES,
Official Court Reporter.

[Endorsed]: Filed July 20, 1951.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE OF TRANSFER

I, Rowland A. Gillette, Clerk of the District Court of Guam for the Territory of Guam, M. I., do hereby certify that the following documents, to wit:

1. Complaint.
2. Summons, showing return of service.
3. Notice of motion. (To E. R. Crain, et al.).
4. Motion to Dismiss.
5. Memorandum in support of Motion to Dismiss.
6. List of Citations of authorities.
7. Written Opinion and Order.
8. Surety for Costs.
9. Notice of Appeal to Court of Appeals Ninth Circuit.

10. Copy of letter notifying opposing counsel of Notice of Appeal.
11. Designation of Record for Appeal.
12. Transcript of Proceedings.
13. Letter of remittal of Transcript.
14. Minutes.

are the original documents filed in the above-entitled case.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Agana, Guam, M. I. this 21st day of July, A. D. 1951.

[Seal] /s/ ROLAND A. GILLETTE,
Clerk of the Court.

[Endorsed]: No. 13025. United States Court of Appeals for the Ninth Circuit. E. R. Crain and Finton J. Phelan, Jr., on Behalf of Themselves and Other Persons Similarly Situated, Appellants, vs. The Government of Guam, Appellee. Transcript of Record. Appeal from the District Court of Guam, Territory of Guam.

Filed July 25, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13025

E. R. CRAIN, et al.,

Appellants,

vs.

THE GOVERNMENT OF GUAM,

Appellee.

STATEMENT OF POINTS

Territory of Guam

Municipality of Agana—ss.

The points upon which appellants will rely upon appeal are:

1. That the court did not exercise sound discretion in refusing the plaintiff's oral motion for an extension of time to properly prepare and present points and authorities in opposition to defendant's and appellee's motion to dismiss, which motion was based upon five separate points, as follows:

(a) This is an improper class action.

(b) Plaintiffs failed to join an indispensable party.

(c) The court lacks jurisdiction over the defendant.

(d) The court lacks jurisdiction over the subject matter.

(e) The complaint fails to state a claim upon which relief can be granted.

2. That the court erred in holding that the Government of Guam was immune to suit.

3. That the court erred in ruling that it could not assume jurisdiction of the subject matter of this case.

CRAIN & PHELAN,

By /s/ FINTON J. PHELAN, JR.,
Attorneys for Appellants.

[Endorsed]: Filed August 15, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD FOR APPEAL

The following portions of the record and proceedings of the District Court of Guam in the case of E. R. Crain and Finton J. Phelan, Jr., et al. vs. the Government of Guam are designated for inclusion in the record on appeal to be submitted to the Ninth Circuit Court of Appeals:

All pleadings and supporting papers.

All motions and supporting papers.

The findings and the order of the court.

The opinion of the court.

The notice of appeal.

Such portions of the transcript of the proceedings as pertain to the question of jurisdiction.

Dated this 2nd day of July, 1951.

CRAIN & PHELAN,

By /s/ FINTON J. PHELAN, JR.,
Attorneys for Appellants.

[Endorsed]: Filed August 15, 1951.

